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In the Supreme Court of the United States

OCTOBER TERM, 1994

KATIA GUTIERREZ DE MARTINEZ, ET AL., PETITIONERS

v.

DIRK A. LAMAGNO, ET AL.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

REPLY BRIEF FOR THE UNITED STATES

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1. Respondent and amicus Kellogg place principal reliance on the Westfall Act's provision that upon the Attorney General's issuance of a scope certification, a civil suit against a federal employee "shall be deemed an action against the United States" under the Federal Tort Claims Act (FTCA), "and the United States shall be substituted as the party defendant." 28 U.S.C. 2679(d)(1). See Resp. Br. 7-12; Kellogg Amicus Br. 8-15. Respondent and his amicus rely heavily on the Act's use of the term "shall" as precluding judicial review. See, e.g., Amicus Br. 4, 8-9. The pivotal issue here, however, is under what conditions the action "shall" be deemed an "action against the United States." The amicus contends that the only predicate for substitution is the

act of certification itself, without regard to whether the certification is properly grounded in law and fact. *Id.* at 10. That contention is inconsistent with the "strong presumption" that courts are entitled to examine the basis for executive action. See, e.g., *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670-673 (1986); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967).¹

Respondent and his amicus, moreover, fail adequately to address the implications of 28 U.S.C. 2679(d)(2), which applies to tort suits brought in state court against federal employees. Section 2679(d)(2) provides that upon

¹ In *Wade v. United States*, 112 S. Ct. 1840 (1992), this Court considered statutory and Sentencing Guidelines provisions that authorize a federal court to impose a criminal sentence below the statutory minimum, and below the Guideline range, "[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense." Sentencing Guidelines § 5K1.1; see also 18 U.S.C. 3553(e). Although both the statute and the Guidelines require a "motion of the government" as a condition precedent to downward departure, and although neither provides expressly for judicial review of the government's refusal to file such a motion, this Court unanimously held that "federal district courts have authority to review a prosecutor's refusal to file a substantial-assistance motion." 112 S. Ct. at 1843-1844. The scope of judicial review in that context was restricted to constitutional claims, see *id.* at 1844, a limitation grounded in the Court's recognition that under the statute and Guidelines the prosecutor retains the discretion to decline to file a motion even where the defendant has rendered substantial assistance, *id.* at 1843. Here, by contrast, the Attorney General can issue a certification only if she determines that the defendant acted within the scope of his or her employment—a determination based upon an established body of law that courts are well equipped to apply.

certification, such a suit "shall be removed" to the appropriate federal district court; that the suit "shall be deemed to be an action or proceeding brought against the United States" under the FTCA; and that "the United States shall be substituted as the party defendant." Section 2679(d)(2) then states that "[t]his certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal" (emphasis added). That language strongly implies that the certification is *not* conclusive with respect to the substitution of the United States as party defendant.

Amicus Kellogg contends that the final sentence of Section 2679(d)(2) was included out of an abundance of caution, on the theory that courts would be likely to scrutinize with particular care the basis for their own jurisdiction. See Amicus Br. 14 ("Removal—because it concerns the jurisdiction of the court—is most likely to spark *de novo* judicial review."). However, in cases in which the Attorney General's scope certification is sustained—which, in the view of the amicus, must be every case where a certification is issued—the suit before the district court will be one against the United States under the FTCA. It is altogether implausible to suppose that a federal district court would doubt the basis for its jurisdiction over such a suit. See 28 U.S.C. 1346(b). Any uncertainty as to the propriety of federal jurisdiction—and any consequent need to clarify that the scope certification conclusively establishes scope of employment for purposes of removal—could arise *only* in cases in which the individual defendant is resubstituted for the United States after judicial review of the certification. Yet under the construction of the statute

proffered by respondent and his amicus, no such cases can arise.²

2. As we noted in our opening brief (Br. 19-20), the authority of federal district courts to review the Attorney General's scope certification under the Federal Drivers Act, Pub. L. No. 87-258, 75 Stat. 539 (codified at 28 U.S.C. 2679 (1982)), was well established. Amicus Kellogg correctly observes (Amicus Br. 16-17) that the Drivers Act directed the district court to remand a case removed from state court if it determined that the case

² This is not a case in which judicial review will interfere with the exercise of Executive Branch discretion or involve the courts in questions that they are ill suited to resolve. The Westfall Act does not empower the Attorney General to develop her own criteria for determining whether an individual employee should be subject to suit in a particular instance. Rather, substitution of the United States pursuant to the certification procedure must be based on the Attorney General's determination that "the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose." 28 U.S.C. 2679(d)(1) and (d)(2). The scope of employment determination, moreover, is to be based on "the law of the place where the act or omission occurred." 28 U.S.C. 1346(b); see, e.g., *Williams v. United States*, 350 U.S. 857 (1955); *Flechsig v. United States*, 991 F.2d 300, 302 (6th Cir. 1993); *Schrob v. Catterson*, 967 F.2d 929, 934 (3d Cir. 1992); *Robbins v. United States*, 722 F.2d 387, 388 (8th Cir. 1984); H.R. Rep. No. 700, 100th Cong., 2d Sess. 5 (1988). Because the certification process primarily involves the application of an established body of law, rather than the exercise of discretion or policy judgment, judicial review of the Attorney General's decision creates no undue risk of interference with Executive Branch prerogatives. The question whether particular conduct falls within the scope of an individual's employment is also well suited for judicial resolution, since it is routinely addressed by courts in their adjudication of private civil actions.

was "one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States." 28 U.S.C. 2679(d) (1982). Although the Drivers Act did not expressly authorize the district court to review the scope certification, the court's power of review was surely implicit in its authority to remand. We do not agree, however, with the amicus's contention (Amicus Br. 17) that the absence of such a provision in the Westfall Act suggests that review of the certification is unavailable. To the contrary, the statute's provision that the scope certification "shall conclusively establish scope of office or employment for purposes of removal," 28 U.S.C. 2679(d)(2), strongly implies that review of certification is available insofar as the substitution of the United States is concerned. Thus, the Westfall Act retains the Drivers Act's implicit premise that the Attorney General's scope certification is subject to judicial review, while altering the jurisdictional consequence of a successful judicial challenge. Under the Drivers Act, resubstitution of the individual defendant required that a case previously removed from state court be remanded to that court. Under the Westfall Act, the district court is directed to retain jurisdiction over the suit even if the Attorney General's scope certification is overturned. See pp. 10-12, *infra*.

3. The Westfall Act provides that "[i]n the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment." 28 U.S.C. 2679(d)(3). Respondent and his amicus argue that Section 2679(d)(3), by

expressly authorizing the court to resolve the scope of employment question (at the behest of the individual defendant) where the Attorney General has declined to issue a scope certification, impliedly precludes judicial review in cases where the Attorney General *does* certify. However, "[t]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. at 674 (internal quotation marks omitted).

Respondent and his amicus rely (Resp. Br. 16-17; Amicus Br. 12) on this Court's admonition that "when a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded." *Block v. Community Nutrition Institute*, 467 U.S. 340, 349 (1984). That decision is inapposite to the present case. The Court emphasized in *Block* that *the same agency orders* that plaintiffs (milk consumers) sought to challenge would be subject to judicial review at the behest of other parties (milk handlers) with similar interests in contesting any unlawful agency action. 467 U.S. at 352; see also *id.* at 349 (where particular persons are authorized to seek judicial review of particular issues, "judicial review of *those issues* at the behest of other persons may be found to be impliedly precluded") (emphasis added). Here, by contrast, respondent does not contend that someone other than a tort plaintiff is authorized to seek judicial review of the Attorney

General's determination that a federal employee has acted within the scope of his employment.

4. Amicus Kellogg contends that "letting a district court determine scope of employment even when the Attorney General does certify would render the certification process of (d)(1) and (d)(2) largely superfluous." Amicus Br. 13. That is not correct. The Westfall Act's certification process facilitates the conduct of litigation by providing for a prompt substitution of parties. In cases where no FTCA exception bars suit against the United States, the Attorney General's scope certification is unlikely to be challenged in court: Many tort plaintiffs will prefer to have the United States substituted as defendant so as to ensure that any judgment will be collectible.³ In such cases the certification

³ Other features of the statutory scheme, such as the unavailability of punitive damages in FTCA suits, see 28 U.S.C. 2674, may occasionally bear on the plaintiff's decision whether to seek redress from the United States or the individual employee. As a general matter, however, a plaintiff will have little incentive to contest the scope certification in cases where no FTCA exception applies, even if he harbors serious doubts as to the correctness of the Attorney General's decision. Cases in which plaintiffs have challenged the Attorney General's scope certification have typically involved situations in which an FTCA exception appeared likely to bar suit against the United States.

Under the Westfall Act, federal employees are immune from tort liability for acts committed within the scope of their employment even where an exception to the FTCA, see 28 U.S.C. 2680, precludes a damages action against the United States. See *United States v. Smith*, 499 U.S. 160 (1991). We do not agree with the contention of amicus Kellogg (see Amicus Br. 24) that judicial review of the certification decision will undermine this Court's holding in *Smith*. It is entirely clear that the Westfall Act does not

process provides an expeditious means of resolving the scope of employment issue in a manner that serves the interests of both the plaintiff and the individual employee; it thereby conserves judicial resources by eliminating the need for a trial court to make its own scope determination. Permitting judicial review in cases (such as this one) where the applicability of an FTCA exception appears likely to bar a suit against the United States will in no way undermine the usefulness of the certification process in the bulk of cases where a certification is issued.⁴

confer immunity for torts committed outside the scope of employment. See 28 U.S.C. 2679(b)(1) (FTCA provides exclusive remedy for losses incurred due to "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment"); H.R. Rep. No. 700, 100th Cong., 2d Sess. 5 (1988) (Westfall Act "provides that the United States will incur vicarious liability only for the common law torts of its employees which are committed within the 'scope of their employment.' If an employee is accused of egregious misconduct, rather than mere negligence or poor judgment, then the United States may not be substituted as the defendant, and the individual employee remains liable."). Resubstitution of an individual employee based on the reviewing court's conclusion that the defendant did not act within the scope of his employment is fully consistent with the text, history, and purpose of the Westfall Act, and with this Court's decision in *Smith*.

⁴ As we noted in our opening brief (U.S. Br. 21 n.6), both the Westfall Act's co-sponsor and the Department of Justice representative who testified in support of the proposed legislation expressed the view that the Attorney General's scope certification would be subject to judicial review at the behest of the plaintiff. See *Legislation to Amend the Federal Tort Claims Act: Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 100th Cong., 2d

5. Amicus Kellogg also contends that to permit judicial review of the Attorney General's scope certification would contravene established principles of agency law, noting that "[u]nder the common law of agency, an employer can become liable for the acts of an employee by conceding that those acts are within the scope of employment." Amicus Br. 20. The amicus contends that judicial "review refuses to give the admission of the employer as to scope of employment its usual force and effect." *Id.* at 24. That argument is without basis.

The "usual force and effect" of an employer's admission regarding scope of employment is that *the employer* may be precluded from disavowing the admission at a later stage of the litigation. The issue here, however, is not whether the Attorney General's scope certification will bind the United States if the certification is un-

Sess. 128, 133, 197 (1988) (*House Hearing*). Amicus Kellogg points out (Amicus Br. 19) that one witness who testified at the House hearing expressed the view that the Attorney General's decision regarding scope certification would not be judicially reviewable. See *House Hearing* at 184. As the representative of the National Treasury Employees Union, that witness's principal concern was for the availability of judicial review at the behest of the defendant employee where certification was denied. See *id.* at 185. We believe that the view of that witness is entitled to insubstantial weight in comparison to the construction of the bill espoused at the hearing by its co-sponsor and the Department of Justice.

Contrary to amicus Kellogg's suggestion (Amicus Br. 19-20), Representative Frank (the bill's co-sponsor) did not simply express a preference for legislation that would preserve a plaintiff's right to obtain judicial review of a scope certification. Rather, he took the position that the bill as written would accomplish that result, see *House Hearing* at 128, 197—an understanding that the Department of Justice shared. *Id.* at 128, 133.

challenged and the suit proceeds under the FTCA. The question instead is whether the Attorney General's "concession" can bind the plaintiff in a suit against the individual employee. Nothing in the common law of agency supports such a result. Nor are we aware of any other instance in which the admission of one party can bind another, at least absent some form of privity between the two litigants.

6. Although the Attorney General's scope certification is subject to challenge insofar as it bears on the substitution of the United States as defendant, the Westfall Act provides that the certification, in cases filed in state court and subsequently removed to the federal forum, "shall conclusively establish scope of office or employment for purposes of removal." 28 U.S.C. 2679(d)(2). In our view this language requires that if the scope certification is overturned, the suit against the individual federal employee must go forward in federal district court and is not subject to remand. Amicus Kellogg contends that "[t]he Article III basis for granting such jurisdiction * * * is questionable." Amicus Br. 29. In fact, however, no Article III problem exists. The Westfall Act's immunity from suit for torts committed within the scope of employment is a right conferred upon federal employees by federal law. Congress's conferral of federal rights under the Act provides a constitutionally sufficient basis for federal jurisdiction, even where the plaintiff's claim arises under state law. See generally *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 491-497 (1983) (presence of foreign sovereign immunity issue furnishes constitutional basis for federal jurisdiction).

The amicus's argument rests on the mistaken assumption that "in those cases removed from state court in which the district court rejects the Attorney General's certification, the underlying case or controversy will not * * * call for any application of federal law." Amicus Br. 31. In fact, a district court's rejection of the scope certification at a preliminary stage of the litigation often will not definitively resolve the defendant's claim to federal immunity. The court might initially conclude that the defendant was not acting within the scope of his employment, and might overturn the scope certification on that basis. That determination would not, however, foreclose the possibility that evidence subsequently obtained through discovery or presented at trial would show that the defendant's conduct, while tortious, fell within the scope of his employment. The district court's initial rejection of the scope certification therefore does not eliminate the possibility that the district court will reconsider the certification question on the basis of the evidence and that the defendant will ultimately prevail on the basis of a federal immunity.⁵

⁵ Even in cases where the district court's rejection of the Attorney General's scope certification definitively resolves the scope of employment issue, retention of the case by the district court does not contravene Article III. The court's review of the immunity question clearly provides a sufficient basis for the initial removal of the case to the federal forum. See *Mesa v. California*, 489 U.S. 121, 133, 136 (1989) (federal immunity defense is a constitutionally sufficient basis for federal jurisdiction). Consistent with Article III, Congress may direct the district court to retain jurisdiction over the case even after its resolution of the scope of employment question. Cf. *United Mine Workers v. Gibbs*, 383 U.S.

In *Mesa v. California*, 489 U.S. 121 (1989), this Court noted that the federal statute allowing removal of suits against federal officers acting "under color of such office" (28 U.S.C. 1442(a)(1)) envisions removal only when the defendant officer asserts a colorable federal defense. 489 U.S. at 135. The Court suggested that a statute permitting removal of *any* lawsuit filed against a federal employee could raise serious constitutional difficulties. *Id.* at 136-139. The Westfall Act does not pose that potential problem. The Attorney General's scope certification under Section 2679(d)(2) reflects a determination that the federal employee in question has a legitimate federal defense under the Westfall Act. Even where the district court overturns the certification and resubstitutes the individual defendant, the certification establishes that the defense is at least "colorable." By contrast, Congress has expressly provided for a remand in cases where *both* the Attorney General *and* the district court have determined that the individual defendant was not acting within the scope of his employment. 28 U.S.C. 2679(d)(3).

715, 725 (1966) (so long as "[t]he federal claim [has] substance sufficient to confer subject matter jurisdiction on the court," district court may exercise pendent jurisdiction over pendent state law claims).

* * * * *

For the reasons stated herein, and in the opening brief for the United States, the judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

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